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NATIONAL WAR COLLEGE

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**THE INCREASINGLY COMPLEX WARTIME ROLE OF LAWYERS IN
TARGETING**

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INTRODUCTION

Legal advisors have long held important roles in the conduct of military affairs, especially in time of war. That role has never been more essential than today. While international rules imposing limits on war have always been complex, the context of modern war and our ability to observe, record, and second-guess its prosecution further complicate the decision-making process.

The ‘CNN effect’ represents one aspect of this change. Real time observation of the conduct of war raises the level of scrutiny on targeting and weapon decisions. U.S. commanders are blessed and burdened with sophisticated intelligence providing great battle space awareness, and advanced weapons systems, including precision guided munitions (hereinafter “PGM”), offering unprecedented accuracy. One of many questions facing commanders having this technology is whether they are **obligated** to use them despite higher costs to minimize “collateral” damage.

Additionally, U.S. justifications for war become complex as we reframe our national security strategy in the post cold war era. Increasingly, the U.S. is using the military instrument for humanitarian operations. This factor alone intensifies international scrutiny, since a military force doing great harm to civilian populations while attempting to “save them” undoubtedly will garner worldwide opprobrium.

Therefore today’s commanders are dependent upon legal advice to prosecute war within the norms of international law and custom. This paper will demonstrate why

lawyers are increasingly involved, especially in the area of targeting. Lawyers must discern clarity amidst shades of gray, weighing competing concerns over tough issues such as “dual use” properties. Lawyering is a growth industry in today’s war fighting machine.

I. The Laws of War on Targeting

At first blush, the idea of civilized rules for the conduct of war seems absurd, an attempt to inject reason into a process which is inherently violent and unreasonable. Nevertheless, a body of international law, treaties, and customary practices exists in part to limit the effects of war on innocent civilians and their property. The U.S. is not a signatory to all of these agreements but considers itself guided if not bound by the relevant provisions of most. These conventions include inter alia the Hague Convention of 1907, the Geneva Convention of 1949, and the Geneva Protocols I & II of 1977 (which the U.S. has not ratified).

The main principles contained in these treaties include the following:

Military Necessity – Justifies those measures not forbidden by international law that are “indispensable for securing the complete submission of the enemy.”¹

Unnecessary Suffering – Prohibits use of weapons designed to, or in a manner intending to, cause unnecessary destruction or suffering.²

¹ Law of War (hereinafter “LOW”), chapter 5-3. (FM 27-10, Para. 3.)

² Ibid.

Proportionality – Mandates that loss of life and damage to property not be excessive in relation to the anticipated direct military advantage. The commander must act take all “reasonable steps” in light of known circumstances.³

Discrimination or Distinction – This is the most fundamental principle of the laws of war, and provides that combatants must be distinguished from non-combatants and military objects from “protected property” or places.⁴

The legality of an attack turns on various factors. Attackers must do everything feasible to ensure that they are aiming at a legitimate military target, not lashing out blindly, and must ascertain whether an attack would endanger civilians and civilian property. Attacks expected to cause civilian suffering are considered “indiscriminate” if such harm is “excessive in relation to the concrete and direct military advantage anticipated.”⁵ This principle proscribes attack on targets containing “dangerous forces” such as dams, dikes, nuclear power stations, etc, which, if unleashed, might inflict great harm upon civilians or their property.⁶

Unfortunately, the doctrine raises more questions than it answers in distinguishing between legal and illegal targets. In today’s high technology world, civilians and military officials share many key systems such as computer networks. Thus, balancing the military necessity of a particular dual-use target against the harm

³ LOW, 5-4, Geneva Protocol I (hereinafter “G.P.I”), Art. 48.

⁴ LOW, 5-5.

⁵ G.P.I, article 57(2).

⁶ LOW, 5-10. The U.S. has not ratified the Protocol containing this provision, but considers itself bound by it nevertheless.

caused to innocents becomes a complicated analysis by intelligence collectors, lawyers, and commanders.

II. Our Technology Entraps Us

The U.S. has made mighty advances in technology that are powerful enablers in the execution of war. Commanders receive sophisticated real time intelligence and have access to PGM's with virtually pinpoint accuracy. These advances are to be celebrated for the power and effectiveness they provide to the achievement of military objectives. But such technology is also a double-edged sword.

Lurking within ability may be a burden of obligation. If our intelligence systems provide us with unprecedented sophistication in identifying targets and PGM's better enable us to hit those targets we wish, aren't we likely to be judged by a higher standard than lesser-equipped fighting forces? Just as Father Hehir argues that embedded within the obligation to assist those in dire need is the ability to do so, isn't it arguable that embedded within one's ability may be an obligation to act? Specifically, as the U.S. perfects PGM technology, will it be expected to forswear "dumb bombs", despite the costs? Lawyers will need to sort through such strategic questions as they balance the relative merits and legalities of particular targets.

III. The CNN Effect

Set against the foregoing backdrop of complexity, is a much closer level of international scrutiny of targeting decisions due to real time, detailed coverage by the

media. Not only has the commander's job become more difficult, it has become more public. The "CNN effect" refers to the graphic nature of television coverage and its alleged power to affect national security decisions. The public receives uncomfortably close views of real time atrocities committed in remote lands. But the coverage continues after the decision to take military action is made, creating formidable hazards for a commander's decision-making process, especially in the area of targeting. The effects of targeting decisions remain for days, weeks, or even months afterwards, and mistakes, through human error, technical failures, or questionable decision-making, can bring international disgrace upon commander and nation. This was graphically illustrated by the bombing of the Chinese Embassy in Belgrade during Kosovo. The increasingly high stakes nature of targeting makes the role of lawyers all the more essential.

This is especially true in light of our current strategy of engagement, which may increase U.S. involvement around the world. If our reasons for becoming involved are humanitarian, our actions undoubtedly will be held to a higher level of scrutiny. U.S. forces cannot hurt innocents in the effort to help them. While humanitarian efforts, such as in Somalia, are inherently difficult for military forces to execute, the commander's task is complicated further by higher standards against which those efforts will be judged.

IV. The Role of Lawyers in Targeting

Lawyers have multiple roles in military operations. They participate in the design and manufacture of weapons systems,⁷ help establish rules of engagement, and train forces in the battlefield, all to ensure compliance with relevant provisions of international law. But nowhere is the role of lawyers more crucial than in the targeting process, as noted by a new joint publication, still in draft form, Joint Pub 1-04, which provides, in pertinent part, “Due to the international law, LOAC, and ROE implications inherent in the targeting process, it is essential to involve the SJA (Staff Judge Advocate) office early in the joint targeting process. Early involvement by the SJA can prevent any possible violations of international law or other guidance.”⁸

Lawyers provide legal review at all levels, during the formulation of operational plans and during the target validation stage, sitting on the Joint Targeting Coordination Board. Lawyers evaluate the legality of proposed targets in light of military gain and resolve questions of dual use and potential collateral effects. It is the lawyer’s responsibility to obtain sufficient information to advise whether a particular target is a “valid defended military objective and whether targeting it complies with the principles of necessity and proportionality.”⁹ At the execution phase, lawyers in the theater monitor application of force to target to ensure compliance with the law. Additionally, lawyers must report on potential violations, directing intelligence

⁷ LOW, 5-11.

⁸ Joint Pub 1-04, Appendix B, Section B (1)(b), *in draft*.

⁹ *Ibid*, Section B, 2(c).

collection to investigate, if needed.¹⁰ To assume these roles, lawyers are assigned at the Joint Staff level, CINC level, Task Force level, down to individual battle groups.

V. Second-Guessing Kosovo

The aftermath of Kosovo is instructive of the perils involved in targeting. The War Crimes Tribunal in the Hague is considering opening a formal investigation of NATO's operations including its targeting decisions.¹¹ This follows a stinging report by the Human Rights Watch (hereinafter "HRW") which, while finding no evidence of war crimes, determined that "NATO violated international humanitarian law"¹² According to Kenneth Roth, the Executive Director of HRW, "All too often, NATO targeting subjected the civilian population to unacceptable risks."¹³

HRW determined that nine attacks were made on non-military, therefore illegitimate, targets, including Serb Radio and Television headquarters in Belgrade, the New Belgrade Heating Plant, and seven bridges without military functions. Additionally, 33 incidents involved the use of cluster bombs in densely populated urban areas (six in Belgrade). Finally, HRW found seven "troubling incidents" of civilian deaths involving attacks on convoys or transportation links where target identification was essential but precluded by pilots flying at high altitudes. HRW also found that

¹⁰ DODD 5100.77.

¹¹ "All Things Considered", National Public Radio (Washington, 3/24/00).

¹² "Civilian Deaths in the NATO Air Campaign", Human Rights Watch, Volume 12, Number 1(D) (Feb. 2000) (Hereinafter referred to as "HRW"), Summary, page 2.

¹³ Kenneth Roth, "New Figures on Civilian Deaths in Kosovo War", Federal Republic of Yugoslavia: HRW World Report 2000, (Washington, 2/7/00).

excessive casualties were caused by NATO not taking adequate precautions to warn civilians or identify them when attacking mobile targets.

HRW was particularly harsh in its criticism of NATO's use of cluster bombs. While the U.S. restricted their use in populated areas by mid May, the British continued using them well into June. The report noted that where weapons used in troubling incidents could be ascertained, 75% involved the use of PGM's, including all bridge attacks and targets in Belgrade.¹⁴ As noted earlier, the advent of such technological developments only raises the level of after-the-fact scrutiny of targeting decisions.

The report's pivotal question was whether "the prospect of civilian deaths (was) sufficiently taken into account in the targeting..."¹⁵ The report concluded that target decisions were a principal contributing factor of civilian deaths and suggested that affirmative measures including better target selection "could indeed have been taken to further reduce the level of civilian harm during these military operations."¹⁶

The report also attacked NATO's strategy of psychological warfare, determining that certain of the targets were chosen to harass civilians, including certain bridges, the radio and television station and others. Attacks on these targets caused great suffering, yet HRW claimed that they had little if any military effect. HRW then called on NATO to review its doctrine on this type of strategy to consider whether it meets humanitarian law.

¹⁴ HRW, Summary, p. 5.

¹⁵ HRW, Summary, p. 6.

VI. Strategic Implications for the Commander

The foregoing illustrates some of the complexities for today's commanders. Much like entrepreneurs, commanders are hamstrung by laws and depend upon legal advice. Our improvements in technology raise fundamental strategic questions, some of which were touched upon in the HRW report. For example, how does one balance the considerations of dual use targets such as media, power grids, computer networks, bridges, etc. in urban warfare, or where the enemy intentionally commingles military forces and equipment with civilian facilities? Milosevic effectively used the media in his information campaign against NATO, and it is understandable that NATO wished to deactivate this tool. But how certain must a commander be that opposing military forces will be sufficiently harmed by the destruction of dual-use targets when civilians also will be harmed? Additionally, how much risk should friendly forces assume to protect civilians? HRW criticized altitude restriction decisions in Kosovo which may have caused unnecessary civilian casualties while maximizing pilot safety, and Lt. General Short admits that such decisions meant that "it was inevitable that we were going to drop a bad bomb".¹⁷ How much risk is too much, how much harm to civilians and their property is acceptable?

The growing use of coalition forces raises concerns beyond the obvious problems of coordinating efforts of a multi-lingual group with varying talent and resources. The task is further complicated when coalition partners have ratified differing international treaties with differing norms. HRW also criticized NATO for having different standards in the

¹⁶ Ibid.

¹⁷ National Public Radio interview with Lt. General Short, Sept. 15, 1999, p. 12.

use of cluster bombs when the U.S. forswore their use mid campaign but British forces did not.

Another important question involves harassment as a strategic tool of psychological warfare. HRW was very critical of this, but according to White House Spokesman, Joe Lockhart, a key component of the strategy against Milosevic was the intention to inflict pain on the Serbian people, literally "turn out the lights on Belgrade".¹⁸ Commanders and their legal advisors will need to consider whether such a strategy is sufficiently likely to achieve the desired effects to warrant the resultant civilian harm. Can we really force people to overthrow their rulers by harassing them?

Related questions involve the use of PGM's and other high accuracy weapons systems. Certainly their use raises the level of international scrutiny in second-guessing targeting decisions, as there is less room to argue that the target was unintended. But with the advent of such precision targeting capabilities, do we as a nation give up the option of employing dumb bombs? If we can be precise, is there ever an excuse not to be? Is there a cost of development of such weapons that is too high to bear to save innocent lives? Have we complicated our ability to conduct war beyond our own resource level?

Finally, can we afford to set ourselves above international regulation? In its investigation of Kosovo, the War Crimes Tribunal has sent NATO numerous interrogatories which thus far are unanswered. In fact, the U.S. has been harshly critical of this matter, which

¹⁸ Dana Priest, "Bombing by Committee", The Washington Post, Sept. 20, 1999, p. 2.

has had a chilling effect on U.S. relations with the Tribunal.¹⁹ How can the U.S. exempt itself from scrutiny and hope to maintain the Tribunal's integrity as well as the U.S.'s own moral authority? These and other questions are topics for future analysis, however they illustrate some of the nitty-gritty targeting complications facing commanders in the modern world of war fighting.

VII. Conclusion

As demonstrated above, the considerations in prosecuting war grow more complex especially in the area of target selection. Outside scrutiny is becoming wider internationally and closer in detail. Advanced technology raises the standard against which our performance, and that of our allies, will be judged. The humanitarian justifications for many of these interventions further demands that U.S. forces do minimal harm as they attempt to aid the needy.

All of these considerations pose fundamental hazards for U.S. commanders and make them increasingly dependent upon legal advice in finding their way safely around the shoals. It is incumbent upon DOD's lawyers to foster U.S. moral authority by ensuring that when the U.S. employs force, it does so in a legal and justifiable manner. Such decisions must withstand close international scrutiny, for without moral authority the U.S. would lose an important component of power and irreparably damage its self-image.

¹⁹ "All Things Considered", NPR, 3/24/00.

